State of Michigan
In the Supreme Court

Appeal from the Michigan Court of Appeals
Judges: Collins, P.J., and Jansen and Whitbeck, JJ.

People of the State of Michigan,

Plaintiff-Appellee,

vs

Clarence D. Moore,

Defendant-Appellant,

Supreme Court No. **120543**

Court of Appeals No. 214248

Circuit Court No. 98-02465-FC

Brief on Appeal – Appellee

Oral Argument Requested

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Table of contents

Index of authorities

Cases

Other Authorities

Statement of jurisdiction

This Honorable Court granted Defendant Moore's application for leave to appeal limited to the issues "whether there is sufficient evidence to convict the defendant of violating MCL 750.227b, and whether the decision in *People v Johnson*, 411 Mich 50 (1981), should be overruled or modified." *People v Moore*, SC 120543 (Oct. 30, 2002). It was further ordered that this case be argued and submitted to the Court together with the case of *People v Harris*, SC 119862 at such future session of the Court as both cases are ready for submission.

Standards of review

The standards of review will be set forth in the argument portion of this brief, *infra.*

Statement of questions presented

Issue I

Whether there is sufficient evidence to convict the defendant of violating MCL 750.227b.

Defendant-Appellant says: No
Plaintiff-Appellee says: Yes

Issue II

Whether the decision in *People v Johnson*, 411 Mich 50 (1981) should be overruled or modified.

Defendant-Appellant says: No
Plaintiff-Appellee says: Yes

Counter-statement of facts

This is an appeal on leave granted to Defendant Moore limited to the issues "whether there is sufficient evidence to convict the Defendant of violating MCL 750.227b, and whether the decision in *People v Johnson*, 411 Mich 50 (1981) should be overruled or modified. *People v Moore*, SC 120543 (Oct. 20, 2002).

The people generally agree with defendant's statement of facts, [Defendant's brief pp 1-8] but will augment and/or clarify the same where it is necessary to properly posture the case for resolution by this Honorable Court.

Issue I

Whether there is sufficient evidence to convict the defendant of violating MCL 750.227b.

Standard of review

To review a trial court's ruling on a motion for directed verdict, the court on appeal considers the evidence presented in the light most favorable to the prosecution to determine whether a rational fact finder could find the essential elements of the charged crime(s) were proven beyond a reasonable doubt. *People v Warren (After Remand)*, 200 Mich App 586, 588 (1993).

Argument

Typically, the sufficient evidence requirement is stated in terms of the trial court's duty when reviewing a motion for directed verdict. *People v Wolfe*, 440 Mich 508 (1992). In deciding a motion for a directed verdict based upon the sufficiency of the evidence, the trial court, without considering witness credibility, must assess whether the evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to find the elements of the crime to have proven beyond a reasonable doubt. *People v Herbert*, 444 Mich 466, 473-474 (1993). By contrast, when deciding whether to grant a new trial, the trial court must decide whether the verdict was against the great weight of the evidence. *Herbert, supra*, p 475. Further, the trial court may grant a new trial after finding the testimony of the prevailing party's witnesses was not credible. *Herbert, supra*, p 477.

In the case *sub judice,* viewing the evidence in the light most favorable to the prosecution, this Court should find sufficient evidence was presented up to the time of the

motion for directed verdict, and that the trial court properly denied the motion. *People v Jolly*, 442 Mich 458, 466 (1993).

Defendant was charged with and convicted of first-degree murder, assault with intent to murder, and, felony firearm as an aider and abettor of co-felon Dejuan Boylston.

Defendant argues that the trial court should have granted his motion for directed verdict on the charge of felony firearm. [Defendant's brief pp 4-7]

The reporter's transcript shows that defendant petitioned the court for a directed verdict of acquittal. [App 1b-5b] The prosecutor argued that if defendant is placing his hands on the gun, if you believe the evidence of witness Johnny Hamilton who indicates that defendant is the second person doing "all that talking", such evidence placed defendant at the point of aiding and abetting the murder, the assault with intent to murder, and, felony firearm. The weapon was pointed at both victims and there were six shots fired because that's how many rifle casings were found. [App 3b] Johnny Hamilton, testifying to the assault upon himself, the murdering his brother and possession of the rifle by cofelon Boylston and defendant. [App 87a-89a; 94a-98a]. Hamilton identified Boylston at a lineup and at cofelon Boylston's trial, but did not identify the taller person [Defendant]. [App 98a-99a] Hamilton testified that the taller guy touched the rifle, demanding to take possession of it and stating "Give me the gun, I'll do it." [App 103a]

Det. Eddy interviewed Defendant-Appellant Moore. In a second interview Moore admitted grabbing the gun claiming he was trying stop the other person [Boylston] from firing it. Before that he had not admitted to having possessed any kind of gun. [App 127a] Defendant finally gave the officer the name of the other person involved in the

shooting [cofelon Dejuan Boylston]. [App 127a-131a] See also App 136a-137a -- Where Defendant Moore admitted having his hands on the gun.

The prosecutor argued that there was plenty of evidence of first-degree murder.

> ... If you believe his client [defendant] is the second person, there were a number of choices made to go over to begin with and follow them down to the lake, after Boylston [cofelon] with the gun decided to change his mind and start walking up the hill. Clearly, there were statements, give me the gun and--some derogatory statements, I'll do the shootin', so there was a choice to stop at that point like Boylston appeared to be doing, but that second guy, who we think was the defendant based on the evidence, didn't wanna stop. It was the second guy that was making the comments as they were coming down the hill before Boylston even appeared to change his mind in terms of jump in the lake, swim across it, shoot them, they guys and they use different words, and I'm gonna use different words in front of the jury, and all the way up the hill rather than leave it alone, he kept degrading Boylston, this second guy, until Boylston finally after turning around a number of times and looking back, shot. So there is clearly a--a good period of time to make decisions in terms of what you wanted to do. There was no argument at all at the time they came over there with that gun. There were a couple words exchanged about five to six minutes maybe beforehand but even that came from the group that defendant came from and so there clearly was no evidence that there wasn't a calm controlled intentional type of mind at work. So -- so it's our position that there is evidence to go to the jury that the defendant was that second guy and if the jury believes he was that second guy there is plenty of evidence to go to the jury on First Degree murder. [App 3b-4b]

The trial court ruled as follows:

> All right, I agree the evidence has been presented and viewing the evidence, as required, in the light most favorable to the People, including all of the witnesses' testimony and statements, it certainly appears to the Court that Mr. Stamos has sufficient evidence to allow the case to go to the jury on all charges including Murder in the First Degree. The time span from Belvidere up to where you go down to the lake and out to the lake and back up the hill, plenty of time to deliberate, think about ahead of time. And there is no indication here that this was anything spur of the moment, it was plenty of time to think about it and execute. [App 5b]

In determining the sufficiency of the evidence, on defendant's motion for directed verdict of acquittal, the jurisprudence contemplates that the trial judge view the evidence

in a light most favorable to the prosecution, with inconsistencies and contradictions therein regarded, and that it allow the prosecution every beneficial and reasonable inference which may be drawn there from, which are consistent with guilt.

See 75 Am Jur 2d, Trial, sec. 1039, p 584 and citations. *People v Hampton*, 407 Mich 354 (1979). No one should gainsay that this judicial function contemplates review of the evidence and some very serious study and contemplation before a ruling is entered. The people submit that an intellectually honest appraisal of the trial record here should compel this Court to find that the trial court was punctilious in the exercise of her discretion in deciding to deny defendant's motion for directed verdict. [See again App 5b]

Here, a rational trier of fact could have found from the facts that Defendant Moore was guilty of First-Degree murder, Assault with intent to murder, and, felony firearm as an aider and abettor of Dejuan Boylston. Under the evidence the case was a matter for jury decision. *People v Lawton*, 196 Mich App 341 (1992); *People v Wilson*, 196 Mich App 604 (1992). Since the trial court fully considered the motion for directed verdict and the trial evidence introduced up to the time of the motion, and concluded that under the jurisprudence the motion should be denied, that decision should be upheld. [App 5b]

Defendant argues in this Court, as he did in the Court of Appeals, that the trial court erred when it denied his motion for directed verdict on the charge of felony firearm because there was no evidence that he handled the firearm used to kill the victim. [App 36a; Appellant's Brief, p 4]

The Court of Appeals summarized the evidence in this regard as follows:

> Here the prosecutor presented evidence that Moore was part of a group of young men who started a verbal altercation with the two Hamilton

> brothers, following which Moore and Boylston went to Thread Lake to engage the bothers again. The evidence indicated that Boylston was armed with a gun and that Moore urged Boylston to kill the two men. When Boylston initially refused, Moore attempted to take the weapon away from Boylston, stating that he would shoot them. When Boylston refused to surrender the gun, Moore began to berate Boylston, calling him names and impugning his manhood. Boylston continued to hold the weapon and proceeded up a hill, away from the two brothers. However, Moore continued to berate and verbally attacked Boylston until, finally, Boylston turned around, aimed, and fired the weapon at the brothers, killing Jacky Hamilton. Viewed most favorably to the prosecutor, this evidence was sufficient for the jury to find beyond a reasonable doubt that Moore, with premeditation and deliberation, aided and abetted in the first-degree murder of the victim, as well as assault with intent to murder Johnny Hamilton. [App 37a-38a]

The Court also found that there was sufficient evidence that Moore aided and abetted Boylston's possession of the firearm to convict him of felony-firearm, citing *People v Johnson*, 411 Mich 50, 54 (1981); *People v Eloby* (After Remand), 215 Mich 472, 478 (1996); *People v Morneweck*, 115 Mich App 156, 158-159 (1982).

The People submit that the Court of Appeals properly found the evidence was sufficient to warrant Defendant's convictions. This Court should reach the same conclusion and thus affirm. In substantial accord with Michigan jurisprudence, 5 Am Jur 2d, Appellate Review, sec. 664, explains the sufficiency of the evidence review standard as follows:

> On review of the sufficiency of the evidence to support a criminal conviction, the critical inquiry is whether the jury was properly instructed and whether the record evidence can reasonably support a finding of guilt beyond a reasonable doubt. The fact-finder retains the function of weighing the evidence, and the appellate inquiry is not whether the appellate court believes that the evidence at trial established guilt beyond a reasonable doubt. The verdict of the jury must be sustained if there is substantial evidence to support it. In other words, the appellate court must consider whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The people submit that the law is clear that the test on appeal is not whether the evidence proves guilt beyond a reasonable doubt, but rather whether there is any substantial evidence of guilt. See e.g., *People v Reyes*, 116 Cal Rptr 217 (1974). In reviewing for substantial evidence, the reviewing court does not reweigh it, but looks at it in the light most favorable to the people. *People v Redmond*, 71 Cal 2d 745, 755 (1969).

The most essential evidence of the prosecution's case has been set out above. The elements of the defense have been set forth in Appellant Moore's brief on appeal. Looking at the record in the light most favorable to the People, as this Court must on appeal, should be no hesitation in concluding that there is substantial evidence to support the guilty verdicts in this case. See *People v Lundy*, 467 Mich App 254 (2002) to like effect.

Issue II

Whether the decision in *People v Johnson*, 411 Mich 50 (1981) should be overruled or modified.

Standard of review

The issue formulated by the Court involves statutory interpretation and should be resolved by applying the Court's independent judgment. It is the duty of a reviewing court to adopt a rule of law which is most persuasive in light of precedent, reason and policy. See e.g., *Todd v State*, 917 P2d 674, 677 (Alaska 1996).

Argument

Appellant argues that the decision in *People v Johnson*, 411 Mich 50 (1981) should not be overruled or modified. He contends that *Johnson* is in accord with logic and common sense and that any conviction for aiding and abetting should be connected to the principal element of the offense being aided and abetted.

The felony firearm statute, MCL 750.227b provides:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223 [unlawful sale of a firearm], section 227 [carrying a concealed weapon], 227a [unlawful possession of a firearm by a licensee] or 230 [alteration of identifying marks on a firearm, is guilty of a felony, and shall be imprisoned for 2 years.

In *People v Mitchell*, 456 Mich 693, 698 (1998) this Court concluded that "the Legislature's intent in drafting the felony-firearm statute was to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute."

The elements of felony firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant,* 235 Mich App 499, 505 (1999). See also CJI 2d 11.34.

This Court in *Johnson,* held that a person who does not actually possess the firearm may be convicted of violation of MCL 750.227b as an aider and abettor if they aid or abet the acquisition or retention of the firearm. *Johnson, supra*; See also *Banks v Smith*, 2002 U.S. Dist. LEXIS 12369; *People v Buck*, 197 Mich App 404 (1992). In *Buck* the defendant carried the firearm in the car after it was acquired by codefendant Geick. In addition Buck loaded and unloaded the weapon on the return trip to the home where the shooting took place. Under these circumstances the court concluded that there was sufficient evidence to convict Buck of aiding and abetting the possession of a firearm during the commission of a felony.

In 47 ALR 3d 1239, **Possession of Drugs—Aiding and Abetting,** the author citing *People v Doemer*, 35 Mich App 149 (1971) says that the argument that the crime of possession of narcotics is of such a character that one cannot aid or abet its commission has been consistently rejected. One explanation which has been given is that possession is an act, not a status, and that one who knowingly acts or encourages another person to obtain or retain possession of drugs or narcotics has aided or abetted possession.

In Perkins & Boyce, Criminal Law, (Third Ed. 1982), Ch. 6, Sec. 8 pp 767, 768, the cases of *Roland v State*, 608 P2d 500, 501 (Nev. 1980) and *United States v Gallagher*, 565 F2d 981 (7th Cir. 1977) are cited in n. 98 as authority for the proposition that an individual can aid and abet a possessory crime. In *Roland* the defendant was convicted of

unlawfully possessing a short-barreled shotgun. The police videotaped Roland and Ricky Williams as they negotiated the sale of a short-barreled shotgun to an undercover officer. Roland using a false name, bargained with the officer as to price. During the discussions, Williams left the building and returned with the shotgun. While negotiations continued, the shotgun remained in the physical possession of Williams. Roland directed the officer to pay Williams the priced agreed upon. On appeal Roland argued that the court erred in giving instructions 8, 9, and 10 because he could not aid and abet another in the crime of possession of a short-barreled shotgun. The Court rejected the argument finding that it is clear that an individual can aid and abet a possessory crime, citing *People v Storr*, 527 P2d 878, 881 (Colo. 1974); *People v Francis*, 450 P2d 591, 595 (Cal. 1969) and Anno. 47 A.L.R. 3d 1239 (and cases cited therein). The Court found that under Nevada law it was necessary to show that a crime had been committed, and that appellant Roland, if present, aided and assisted it. Here, Williams had actual possession of the short-barreled shotgun in violation of the law. The Court found that a jury could reasonably conclude that appellant Roland, by his presence and negotiations, aided and assisted Williams in retaining possession of the prohibited weapon until such time as a price satisfactory to both was obtained from the officer. In *Franklin v State*, 610 P2d 732 (Nev. 1980), the Court, citing *Roland*, found that Franklin's accomplice clearly had possession of the shotgun during the robbery and that a jury could reasonably conclude that Franklin aided or encouraged that possession. In addition, the Court said that a jury could reasonably conclude that Franklin had dominion over, and the right to possess, the shotgun found on the front floorboard of the car he was driving, citing *State v Atkinson*, 523 P2d 737 (Kan. 1974).

This Court in *Johnson* cites *People v Doemer*, 35 Mich App 149 (1971) and *People v Francis*, 450 P2d 591 (Cal. 1969) as requiring evidence that the aider and abettor assist in obtaining the proscribed possession or in retaining such possession otherwise obtained. [411 Mich at p 54] Based on *Johnson,* the Michigan Criminal Jury Instructions, CJI2d 11.35 [Aiding and Abetting Felony Firearm: Direct Participation] and CJI2d 11.36 [Aiding and Abetting Felony Firearm: Indirect Participation] in subsections (6) thereof both require proof "that the defendant intentionally helped the person who possessed the firearm get or keep it."

As stated above, the elements of felony firearm, are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505 (1999).

In *People v Palmer*, 392 Mich 370 (1974) the Court explains that the phrase "aiding and abetting" is used to describe all forms of assistance rendered to the perpetrator of a crime. The term comprehends all words or deeds which may support, encourage or incite the commission of a crime. It is said to include the actual or constructive presence of an accessory, in preconcert with the principle, for the purpose of rendering assistance, if necessary. Finally, the amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime. [392 Mich at p 378]

In *Francis, supra,* the California Supreme Court said that the test for aiding and abetting was "whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures. " (Id. at 72, quoting *People v Villa*, 156 Cal App 2d 128, 134 (1957)). In reversing the defendant's conviction, the Court goes on

to state that "*The record does not show that Francis aided or encouraged Gary Anderson in obtaining or retaining possession of marijuana.*" The Court further said that "So far as appears, when Francis expressed interest in buying marijuana Gary Anderson may already have had possession of the marijuana he later sold; the record shows merely that Gary Anderson stated he would have to go to Bell Gardens to pick it up."

It appears that several of the appellate courts throughout the country have focused on the italicized language of the Francis case, and have determined that to prove aiding and abetting in possessory crimes not involving drugs, the prosecution must prove that the aider and abettor aided his cofelon in obtaining or possessing the weapon. This may not be the case.

In 21 Am Jur 2d, Criminal Law B. **Participants**, in section 203 it is said: There are some offenses which are so defined by statute or by the common law that they may be committed only by certain persons or classes of persons. But a person not within the class of those by whom the crime may be personally perpetrated may, by aiding and abetting the commission of the offense, render himself criminally liable...

In sec. 206 **Aiders and abettors** it is stated:

> Aiding and abetting means to assist the perpetrator of a crime. An aider and abettor is one who is present at the crime scene and by word or deed gives active encouragement to the perpetrator of the crime or by his conduct makes clear that he is ready to assist the perpetrator if such assistance is needed.
>
> Observation: Only slight participation is needed; to change a person's status from that of a mere spectator to an aider and abettor.
>
> Some authorities require additionally that a defendant share the principal's intent to commit the offense.
>
> To be liable as an aider and abettor, the evidence does not have to establish a defendant's specific knowledge of which particular

> crime his co-participant will commit, but some authorities require the defendant have a general knowledge of the perpetrators' general purpose.

The decisions tell us that aiding and abetting occurs "when a defendant 'willfully associated himself in some way with the criminal venture and willfully participated in it as he would in something he wished to bring about.'" *United States v Phillips*, 664 Fed 971, 1010 (5th Cir. 1981), *cert den.* 73 L Ed 2d 1354 (1982). To aid and abet, the defendant must share in the intent to commit the offense as well as participate in some manner to assist its commission, *United States v Cowart*, 595 F2d at 1035. The defendant need not, however, commit all elements of the substantive underlying offense as long as he aided and abetted each element. When a defendant is shown to have aided and abetted each element of the substantive offense, he his punishable.

In 21 Am Jur 2d, Criminal Law, sec. 186, **Theories of Liability** it is said:

> There are several theories of criminal liability by which a participant in crime may be convicted of that crime although he or she is not the actual perpetrator of the criminal act. Such theories are variously termed guilt by accountability, aider and abettor liability, accomplice liability, joint criminal liability, joint criminal venture, acting in concert, complicity, or law of parties.

The supplement to sec. 186 makes reference to "*Criminal Liability for the act of another. Accessorial liability and the doctrine of joint enterprise*", 62 Crim L 4: 352 (1999), Simon Parsons, Senior Lecturer in Law; South Hampton Institute.

The author explains that in England, the accessorial liability of secondary parties is governed by s 8 of the Accessories and Abettors Act of 1861. The author further states:

> The meaning of 'aid, abet, counsel and procure' has been the subject of judicial review and the words given their ordinary or natural meaning. To 'aid' means to give help, support or assistance to the principal at the time of the offence, whilst to 'abet' means to incite, instigate or encourage. 'Abet' can be distinguished from 'counsel' in that abetting involves incitement at the time of the offense, whilst counseling involves incitement at an earlier time. Thus generally 'aiding and abetting' can be used to describe activity of secondary parties who are present when the offense is committed, whilst 'counselling and procuring' can be used to describe activity that took place at an earlier time...

Under the section **Causation and accessorial liability** the author explains that a secondary party cannot in any narrow sense 'cause' the principal offense 'for he does not control the principal actor, and neither is the behaviour of a human agent 'invariable'. The question is then asked "But is it necessary to prove in a wide sense that the aiding, abetting, procuring or counseling by the secondary party caused the principal to commit the principal offence? The author states that procuring does require causation without consensus, but for aiding, abetting and counseling there is no requirement that the secondary party factually contributed to the occurrence of the principal offense in that particular offense on that particular occasion. This is a move away from the derivative basis of secondary liability which requires that a secondary party's liability be derived from that of the principal and consequently the scope of accessorial liability has been widened. The author goes on to state:

> So why have the courts not required that causation be a general basis of secondary liability in crime? The first reason is that if both primary and secondary liability require causation, the distinction between a joint principal and a secondary party breaks down. This difference can be maintained by regarding the secondary party as causing the principal's conduct with the principal causing the actus reus. This does make sense with result crimes where the result is the actus reus, but not with conduct crimes where the principal's conduct is the actus reus. The second reason is that the existence and application of the doctrine of joint enterprise has enabled the courts to avoid the question of causation. The need to prove causation is avoided because the doctrine is broad and imprecise in that it

covers the events from the agreement of the joint enterprise to the commission of the offense.

In **Clark and Marshall Crimes** (6th Edition 1958), Ch. 8, **Variations in Presence and Participation in Perpetration of Offenses**, Sec. 8.08, Acts for Which Accomplices are Responsible it is stated:

> I. To be liable as an aider or abettor, or as an accessory before the fact, an accused must have expressly or impliedly assented to the commission of the crime in which he is sought to be implicated.
>
> A. But if a person joins in a venture to commit some identified offense, by aiding, abetting, counseling, or commanding its execution, that person is legally treated as assenting to offenses committed by his associates during the execution of the common purpose and which harms are the natural or probable consequences of the initial effort.

In Chapter 2, **Some Characteristics of Criminal Law**, Sec. 2.05, p 116 it is said that:

> It needs to be underscored that accessorial status arises only when a crime is committed, in contrast with conspiracy where the distinct offense consists of combining (save where some overt act is required, See sec. 9.00) and further responsibility flows from the extant conspiracy.

It is important observe that "Aiding, abetting, and counseling are not terms which suppose the existence of an agreement," according to the majority opinion of Chief Justice Warren in *Pereira v United States*, 347 US 1; 74 S Ct 358, 98 L Ed 435 (1956), where it is pointed out that "those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy."

The decisions state that "Generally speaking, to find one guilty as a principal on the ground that he was an aider and abetter, it must be proved that he shared in the

criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed." *Johnson v United States*, 195 F2d 673, 675 (8th Cir. 1952).

In a similar vein, the Mississippi Supreme Court in *Shedd v State*, 87 So. 2d 898, 900 (Miss 1956), said that "Aiding and abetting in the commission of a crime involves a community of unlawful purpose at the time the act was committed. It involves some participation in the criminal act, in furtherance of a common design either before or at the time the criminal act is committed." Other decisions tell us that "Conspiracy ... is not synonymous with aiding or abetting or participating. Conspiracy implies an agreement to commit a crime; to aid and abet require actual participation in the act constituting the offense. *People v Malotte*, 46 Cal. 2d 59, 292 P2d 517 (1956).

The People respectfully submit that *People v Johnson*, 411 Mich 50 (1981) should be re-examined in light of the above-referenced jurisprudence. To be convicted of violation of MCL 750.227b, the primary defendant must be shown to be guilty of possessing a firearm during the commission of, or the attempt to commit a felony. See again *People v Avant*, 235 Mich App 499, 505 (1999) and CJI2d 11.34. If this Court adopts the above-referenced jurisprudence as representing the generally accepted legal definition of aiding and abetting, i.e., that that legal concept involves a community of unlawful purpose at the time the act is committed, and involves some participation in the criminal act, in furtherance of a common design before or at the time the criminal act is committed, then it is clear that the *Johnson* definition it too limited. The facts of the case *sub judice* do not show that Defendant Moore aided or abetted cofelon Boylston in the acquisition of the firearm. The facts may arguably show that Moore's conduct caused Boylston to retain the firearm where Moore urged him to kill the two men and when

Boylston initially refused, Moore tried to take the gun away, stating that he would shoot them. This threat caused Boylston to refuse to surrender the weapon, and thus retain it. Boylston's retention of the weapon was further fortified when Moore engaged in name calling and impugned Boylston's manhood until such time as he fired the weapon at the Hamilton brothers and killed Jacky Hamilton. While this factual scenario arguably meets the retention test of *Johnson,* the People submit that the better approach to the concept of aiding and abetting felony firearm, is the approach discussed in the above-referenced decisions. That is, Defendant Moore's above-described conduct shows that he aided and abetted the possessory crime of felony firearm where he expressly commanded and otherwise importuned gun toting Boylston to execute the Hamilton brothers. Under the above cited decisions it is not necessary to show that someone in Defendant Moore's position as a secondary party aided or abetted his cofelon in obtaining or retaining the firearm. While the *Francis* case cited in the *Johnson* and *Doemer* decisions reversed a marijuana possession conviction where the record failed to show that "Francis aided or encouraged Gary Anderson in obtaining or retaining possession of marijuana", the People maintain that that statement does not establish a legal basis to require the prosecution to prove that a secondary party such as Defendant Moore, as an aider and abettor of a principal possessing a weapon while committing another felony, helped the principal obtain or retain possession of a weapon. The position of the People here, is in accord with the above-cited United States and State Court decisions as well as the British approach where author and lecturer Simon Parsons states that aiding, abetting and counseling does not require that the secondary party contribute to the occurrence of the principal offense. Accordingly, the people ask that this Court will modify *People v*

Johnson to properly reflect the concept of aiding and abetting as it relates to the possessory offense of felony firearm.

Relief

Wherefore, the People pray that this Court will affirm Defendant's conviction for aiding and abetting the offense of felony firearm. The People further pray that this Court will modify *People v Johnson*, 411 Mich 50 (1981) to properly reflect aiding and abetting criminal liability.

Date: Janaury 27, 2003

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